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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA UNITED GOLD MINING CO.,
Plaintiff in Error.
vs.
HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,
Defendant in Error

In Error to the United States District Court for Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR,

Filed by MALONY & COBB,
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Statement of the Case.

There was an action at law brought by the defendant in Error, Henry Muset, as administrator of the estate of Edward Hegman, deceased, against the plaintiff in Error, the Alaska United Gold Mining Co. to recover $10,000.00, damages, to said estate. The cause of action alleged, was for negligently causing the death of said intestate, and the suit was brought under the provisions of Section 353 part IV of Carter Alaska Code.

The allegations of the Complaint in substance were, that on October 9th, 1900, Edward Hegman, died intestate, and on Nov. 21st, 1900, the plaintiff was duly appointed his administrator. That on the date of his death and for a long time prior thereto, Hegman was, and had been an employee of the defendant Company, working in the Seven Hundred Mine, under the instructions of the foreman of said mine, and the other agents, officers, and vice-principals of defendant in control of that branch and department of the defendant's workings. That, while deceased and his co-laborers, were at the bottom of a shaft, engaged in sinking the same, and after they had sunk drill holes in the bottom of said shaft, and loaded the same with powder and fuse preparatory to blasting, and after they had signalled to the parties, in charge of the hoist indicating their purpose and readiness to blast, and after

the parties in charge of the hoist had indicated by signal that they understood said blasts were about to be fired, and indicated their readiness and ability to hoist deceased and his co-laborers, out of the shaft, after the fuses were lighted, the deceased and his co-laborers lighted the fuses, entered the elevator and signalled to be hoisted out of the shaft, when they were informed that the compressed air, furnishing the power to the hoisting engine, had been cut off at the surface above. Deceased thereupon made every effort to escape from the shaft, but was unable to do so, and the blasts exploded and he was killed. The Complaint denied contributory negligence on the part of deceased and charged gross negligence on the part of the "officers, agents, and vice-principals of the defendant Company in causing said air and power to be disconnected and cut off." It further alleged that deceased was thirty years of age, in good health and prayed $10,000.00 damages. (Printed Rec. pp. 6–10)

The defendant filed an answer in the nature of a plea in the abatement, denying that the plaintiff was the administrator of the deceased, because the appointment was made on the very day the petition was filed, without any notice or process whatever and in a purely ex parte proceeding. (Pr. Rec. pp. 11–13).

In reply to this, plaintiff moved for judgment for want of sufficient answer. (Pr. Rec. p. 14).

The Court overruled the motion, but held the plea insufficient, to which defendant excepted, and required defendant to answer to the merits. (Pr. Rec. pp. 15-16).

Defendant then answered denying that plaintiff was the administrator of Hegman, denied all negligence, and set up that the death of deceased was caused solely by the negligence of his fellow servants and his own contributory negligence. (Pr. Rec. pp. 16-18).

In reply, plaintiff denied contributory negligence and negligence of fellow-servants. (Pr. Rec. p. 19).

The case was tried to a jury, which returned a verdict for plaintiff for $10,000.00. On motion for a new trial the Court required a remitter of $7,000.00 and rendered judgment for $3,000. (Pr. Rec. pp. 21-23 and pp. 105-108). A Bill of Exceptions was saved, Writ of Error sued out, Assignment of Errors filed, Citation in Error served, bond given, and the cause is now here presented for correction and revision.

The Errors relied upon relate to the ruling of the Court on the plea in abatement, the admission of evidence and to the instruction given and refused and these will be presented in their order.

There was no dispute about the facts. The main error relied upon is a very plain one All the evidence is in the record.

The shaft in which deceased lost his life was started to be sunk about three weeks before the accident, and had then been sunk to a depth of 25 feet. (Pr. Rec. p. 73). The defendant owns and operates two mines and two mills, on Douglas Island, Alaska, the Ready Bullion and the Seven Hundred. Mr. C. A. Weck was the superintendent of the defendant (Pr. Rec. p. 68). There were two mine foremen and two mill foremen under him (Pr. Rec. p. 69). One H. B. Pope was one of the mine foremen. The shaft was being sunk from the 260-foot level in the Seven Hundred Mine and the hoist used in connection with the work of said sinking, was operated by compressed air power, the air being supplied by the compressor at the mill, and carried to the hoist engine by piping. At the time of the accident, three men were at work in the bottom of the shaft, viz: the deceased, Ed Hegman, James Pianfetti, and plaintiff. (Pr. Rec. p. 73). The method of blasting was as follows: After the men in the shaft had drilled and charged the holes, they would signal to the engineer in the 260-foot level that they were ready to blast. He answered the signal by raising the elevator, a few feet and letting it down again. The fuses were then fired and the men entered the elevator, signalled to the engineer to hoist and were taken to the upper level out of the way of the blasts. (Pr. Rec. p. 38).

At the time of the accident, ten holes had been

charged. What happened next is told by the plaintiff as follows:

"While we had about two holes to load, I told Ed. I says to him, 'You better go up and tell.'—I went up after the iron and went up to the two sixty level; and I met Pope at the two-sixty level. He came off the skip just as I came on and he asked me, 'Where are you going,' and so I says: 'We are going to blast,' or that is, he asked me if we were going to blast and I said yes. I then took the skip and went to the surface, and I was going to have the five bells, from the bottom of the shaft as soon as I went down with the iron and I was going to have the five bells from the two-sixty level and because the boys did not have the primers in yet I was to wait. That signal of five bells was to indicate that we were ready to blast, and when I was up there in the blacksmith shop, I stood in the blacksmith shop and asked the blacksmith if the iron was ready and he said yes. So I went in to the shaft house to get the five bells and Mr. Pope came up and told me to take the iron down, the boss was waiting for me. I then went to the blacksmith shop, and got the iron and then went to the two-sixty level I then went on the skip, and went on the bucket and asked to be lowered down, and when I came down there, I turned around and rang the five bells to the engineer. I rang the five bells for the signal that we were ready to blast. The engineer

moved the bucket about three or four feet from the bottom of the shaft and dropped it down again and that was his signal that he was there and knew what he was doing. Well, Ed. cut the fuses and I lighted them with the iron, and threw the iron again to one side, and we jumped on the bucket, and rung one bell to the top; and that was for to hoist up; and he raised us a little, and we came back again, and he hollered down that he didn't have a pound of air, and to save ourselves. Jim was standing on the bucket all the time while we was lighting the fuses, and he had the candle, and so when he was told that he didn't have any air, we jumped off the bucket again. Well, Jim dropped the candle sticks, and then we were in the dark, and the only way we had to get out was to get up that cable —its a quarter inch cable, steel cable; and I felt around, and of course I could not tell whether Ed. was before me or after me, I didn't have any idea, because we was in the dark; anyway I got hold of the rope, and began to climb the pole. I climbed to the skip chute, and swung myself in the timbers, and then Jim began to holler to me and call for help, and I put my hand out and helped him off the timber, and I asked for Ed. and Ed. began to holler and tell me to help him. I couldn't do anything. I couldn't go down the rope, and pack a man up heavier than me. Well, we stayed till the blast went off, and finally the skip came down and went from that level to the surface to see what was the matter." (Pr. Rec. pp. 37-39). These facts are also

testified to by the engineer in charge of the hoist. (See Pr. Rec. p. 42), and undoubtedly correctly give the details of the accident.

Plaintiff's witness, Guy Falconer, testified as to the cause of the failure of the air. His testimony on this point is as follows, and is nowhere contradicted or questioned:

"On the 9th day of last October, I was employed in the Seven Hundred Mine, and was so employed at the time the explosion that resulted in this case, took place. I was helping Mr. Pope part of the day. He was foreman of the Seven Hundred Mine. As such foreman, his duties were to advise the men, show what they were to do and tell them where to work. The Seven Hundred Mine is a part of the Treadwell department from the Treadwell. It furnishes all the ore for the Hundred Stamp Mill. That mine was under Mr. Pope's supervision at that time. I saw him that day. The explosion took place about eleven o'clock in the morning. The air at the Seven Hundred Foot Mine was disconnected about that time. About a quarter of eleven, Mr. Pope came to me, and told me to get the ladder and I went and got the ladder and he put it against the pipe, and he climbed up and shut the air off. I was standing below holding the ladder for him. He told met to get the wrench so he could uncouple the pipe and I got the wrench, and he and Hoyt unscrewed

the pipe, and he went out That was a few minutes before the explosion. I seen Henry Muset just a few minutes before that. He came up for the iron, and I seen him go down with it. The pipe I speak of seeing them disconnect or unscrew was the pipe that furnished air and power for the shaft in which Henry Muset and Ed. Hegman were working." (Pr. Rec. pp. 43-44). He is also corroborated by Thos. Tatum. (Pr. Rec. p 48).

There was no testimony tending to show, that any of the machinery or appliances were out of repair, or unsafe. No such claim was made. The plaintiff's whole case was based upon the proposition that the defendant Company was liable for the neglience of H. B. Pope in shutting off the air in the manner described. Pope's position and duties are described by plaintiff's witnesses as follows:

"Mr. Pope was foreman in the mine under Mr. Weck—That's the way I understood it, yes sir. I know that Mr. Weck was superintendent of the mine and had entire charge and control of it. Mr. Pope was simply a foreman in this particular mine. The Alaska United Company, is also operating the Ready Bullion as I understand it. Mr. Pope was not foreman at that mine. He wasn't foreman of the general business of the Alaska United Company either. He wasn't foreman of the mill. There was another foreman in charge

of that the same as Mr. Pope was in charge of this particular mine. The Master Mechanic had charge of the mechanical part, of course. (Pr. Rec. p. 49).

C. A. Weck in behalf of the defendant testified among other things, as follows:

"I have been in the mining business about eight years. There was a hoist furnished and a chain ladder furnished the men engaged in sinking this particular kind of a shaft, to get out of the mine after the blasts were fired. In sinking a vertical shaft, it always is the custom to have a chain ladder in the shaft in addition to the other means of escape. These ladders are made of chains and cross bars of iron. They are made of chains for the reason that rock being blasted won't injure them as much as they would wooden ladders. These ladders are supposed to be let down from the lowest set of timbers to the bottom of the shaft, so in case there is any stoppage of the engine in hoisting the men out they would have a chance to climb out by the chain ladder. Wherever we are sinking a vertical shaft, we have a chain ladder. It is furnished to the men who are doing the work for the men to use themselves like any other tools." (Pr. Rec. pp. 70–71).

James Pianfetti testified: "I reside now on Douglland Island, and resided there last October, and was then working for the Alaska United Company, of

which Mr. Weck was superintendent. Had been at work there then close to three years. I knew Mr. Muset. I was working with Muset, and Hegman, and Stephens on that date, sinking a shaft. I don't know the first names. Had been at work in the shaft about three weeks—that is, at the time of the accident, we had been at work about three weeks. Hegman and Muset had been at work with me the whole of this time. On the 9th of October, we had got the shaft sunk about 25 feet below the skip chute. There had been a chain ladder provided for that shaft. It was at that time in the blacksmith shop. We three men had received instructions as to the chain ladder from Mr. Pope. He told me to put it down the shaft. I had a conversation with Hegman and Muset about those instructions; we was talking about it so could blast; we had to put timbers in and then chain 'adder. We concluded to put in the timbers and ladder after the blast went off. It was the duty of all us working there to put down the chain ladder. At the time of the accident the chain ladder was in the blacksmith shop. It had not been removed from there. If that ladder had been in shaft, Hegman could have got out." (Pr. Rec. pp. 72-73). This testimony was nowhere contradicted or questioned.

This brings us to a consideration of the Fourth, Sixth, and Seventh Assignments of Error, which re-

late to the same question and will therefore be presented together.

Fourth Assignment of Error.

The Court erred in refusing the motion of the defendant, made at the conclusion of the whole testimony, to instruct the jury to return a verdict for the defendant. (Pr. Rec. p. 112).

Sixth Assingment of Error.

The Court erred in instructing the jury as follows:

"If he (meaning Pope) had absolute charge of that particular department, and exercised the powers and duties of the master toward the employes working under him, he was a vice-principal."

"If you find from the weight of the evidence in this case, that Pope, the foreman, was the vice-princi pal of the Company or corporation defendant, and that said Hegman lost his life through the careless and negligent act of said Pope, without any negligence on the part of Hegman himself, then you should find for the plaintiff."

Seventh Assignment of Error.

The Court erred in instructing the jury as follows:

"There is some evidence before you in reference to a chain ladder ordered to be furnished to the men in sinking the shaft, and that said ladder was a reasonable and proper means used, or to be used, by the men sinking the shaft, whereby they might escape from danger in case of accident to the other machinery and appliances used in hoisting the men from the shaft at such times as blasts were exploded. If you find from the weight of evidence in this case that a ladder was furnished to the men for their use in this behalf, and through the carelessness and negligence of the men engaged in the work of blasting in the shaft, and that the deceased Hegman was one of these, and that the men could have escaped from impending danger had the ladder been put in place, and they negligently and carelessly failed to put it in place, this was contributory negligence upon the part of the deceased and the other men working with him such as relieved the defendant from all liability for his death. If, on the other hand that such ladder was not furnished to the employees, and was not put in place because of the orders of the said Pope, if you find Pope to have been a vice-principal, and that the death of Hegman resulted from the failure to put in said ladder and by the shutting off of the air by Pope, or under his orders and

directions so that the other machinery and appliances for hoisting the men could not be operated; and you further find that Pope was so acting, in shutting off the air, was exercising duties entrusted to him as a vice-principal of the master, then the defendant is liable for the death of the said Hegman. (Pr. Rec. pp. 114-115).

The Bill of Exceptions shows (Pr. Rec. pp. 87-88) that at the conclusion of the whole testimony, defen dant moved the Court to instruct the jury to return a verdict for the defendant; first, because the evidence conclusively showed that H. B. Pope, whose negligence in cutting off the air is the only negligence plead or attempted to be proven by plaintiff, was a fellow-servant of the deceased Ed. Hegman.

Second, The evidence conclusively showed that the deceased Edward Hegman and the plaintiff, Henry Muset, were guilty of contributory negligence in not putting the chain ladder in the pit, and that but for such contributory negligence the accident resulting in the death of Ed. Hegman would not have occurred. But the Court overruled this motion, and the defendant excepted.

The Bill of Exceptions further shows (Pr. Rec. pp. 90 91) that the Court thereupon gave its instructions to the jury on the subject of the defendant's lia-

bility for the acts of Pope, quoted in the Sixth Assignment, and the defendant excepted. And on the question of contributory negligence the Court gave the instruction quoted in the Seventh Assignment, and the defendant excepted.

There are two legal propositions involved in the ruling complained of. First, Was there anything in the evidence, tending to show that Pope was a vice-principal of the defendant, and not a fellow servant of the deceased? And, second, Was there anything in the evidence from which it could be reasonably inferred that the deceased was not guilty of contributory negligence?

If either of the propositions must be answered in the negative, then the defendant was entitled to the peremptory instruction prayed for. Unless they can both be answered in the affirmative, the judgment must be reversed.

The first proposition has been authoritatively settled, by the Supreme Court of the United States in the case of Alaska Treadwell Gold Mining Co. vs. Whelan, 168 U. S. 86. In that case one Finley, the foreman or boss in charge of the mine ordered the plaintiff to break rock over a chute While performing that work, Finley negligently failed to give notice that the ore was going to be drawn through the chute, and

the plaintiff was injured by such negligence. There was testimony tending to show that Finley had authority to hire and discharge employees under him. Finley employed the plaintiff, and his duties were to "see that the men did their work, to direct them where to work and to notify them when the rock was to be drawn from the chutes. It was the duty of plaintiff to obey Finley's orders. Finley was his boss, (See C. C. A. Rep. 12 p. 227). The whole mine was under a general manager. These facts were undisputed. In the case at bar, the whole mine was under one C. A. Weck. Under him were two mine foremen. Pope was one of the mine foremen. The duties of the mine foremen were to carry out the orders of the superintendent, Mr. Weck, who was the head of the business in Alaska. They were employed by the Superintendent and were subject to be discharged by him. The foremen had no authority to hire and discharge men; their only authority in that respect was to recommend. (See Pr. Rec. pp. 68-69). These facts were undisputed, and under the law it made him a fellow-servant of a higher rank than the plaintiff's intestate, it is true, but none the less a fellow-servant, "employed in the same department of business and under a common head."

Again in Keegan vs. Ry. Co. 160 U. S. 259, the facts were that "the direction of all these operations (by which plaintiff was injured) was with O'Brien, who is called in the evidence sometimes 'Foreman driller,'

sometimes, 'conductor of the drill crew.' The general management of the operation was with him, and he had control over the persons employed therein." But the general instructions came from the yardmaster and O'Brien, as well as the plaintiff, were under him. Keegan was injured by the negligence of O'Brien in ordering him to couple cars, which he had just ordered to be uncoupled from a backwardly moving train to stationary cars beyond without himself being on the moving cars, or seeing that another was on them to exercise control over their movements. It was held by the Supreme Court that O'Brien was a fellow-servant of Keegan, and he could not recover. In the course of the opinion, the following language of the Supreme Court, of New Jersey, is quoted with approval:

"Whether the master retain the superintendence and management of his business, or withdraws himself from it and devolve it on a vice-principal or representative, it is quite apparent that although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of the work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected

as the leader. boss, or foremen, to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow-workman. The foreman, or superior servant stands to him, in that respect, in the precise position of his other fellow-servants."

This decision and the language qucted is peculiarly applicable to the case at bar. Here the defendant had devolved the management of its business upon a vice-principal, C. A. Weck; Weck employs foremen to carry out his orders in different parts of the work under him; one of these foremen negligently injures a laborer under him; the negligence consists, not in the giving or failing to give any instructions as foreman, but in doing at an inopportune moment a piece of work with his own hands that which might have been done by any other laborer. The negligence in short, was not even the negligence of the foreman, Pope acting as foreman, but it was the negligence of Pope working at the time as an ordinary laborer. Under the undisputed facts, and the authorities cited, we think it clear that Pope was a fellow servant, and that the prayer

for a peremptory instruction for the defendant should have been granted on that ground. (Stevens vs. Chamberlain, 100 Fed. 379. See also the very late case of McDonald vs. Buckley, 109 Fed. 290).

We will now also briefly present our views on the other branch of the question. Was the plaintiff's intestate guilty of contributory negligence? Again the facts are undisputed. Pianfetti testified that the defendant company furnished a chain ladder, to be put in the shaft whereby the men could get out, in the event of the hoist failing for any reason to work. (Pr. Rec. p. 73). Weck testified to the same thing. (Pr. Rec. pp. 70-71). Pianfetti further testifies that he was told to put this ladder in the shaft by Pope; that it was the duty of the men at work in the shaft, the plaintiff, the plaintiff's intestate, and Pianfetti to put the ladder in the shaft. He talked the matter over with Hegman and Muset, and they concluded that it was not necessary to put the ladder down until after the blast was fired. That blast was the one that killed Hegman. Under these facts, the defendant was not liable for the death of Hegman. Having provided an appliance to secure the safety of the employee, the employee must use that appliance to secure his own safety. If he neglect to do so, and he is injured, where he would not have had been had the appliance been in use, he cannot recover. (Hunt vs. Kile, 98 Fed. 49). In that case,

the plaintiff's intestate was killed by the breaking of an anchor rope, whereby a pile was dropped upon him. It was held that the failure of the employer to furnish clocks to the employee as a preventive of such an accident, if negligence; was a risk assumed by the employee, since he had full knowledge of such matters. In the case at bar, the chain ladder as a preventative of the fatal accident was furnished by the employer, but the employee and his fellows negligently postponed its use. Certainly then as a matter of law, the plaintiff's intestate assumed the risk, and the jury should have been peremptorily instructed to find for the defendant on this ground also. Instead, the Court, gave the instruction quoted in the VII Assignment, to which the defendant excepted because the evidence conclusively showed that the chain ladder was furnished, and the Court erred in submitted that question to the jury.

Fifth Assignment of Error.

"The Court erred in instructing the jury as follows:

"In defining the duties of the master toward the servants, I cannot do better than to use the language of the Supreme Court of the United States: 'A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or

machinery with which he is to work, or by which he is to be surrounded, be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter his service he impliedly says to him that there is no other danger in the place, the tools, the machinery, than such as is obvious and necessary. Of course, some places of work, and some kinds of machinery are more dangerous than others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precaution shall be taken to secure safety; and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, see fit to have it attended to by others, that does not change the measure or obligation to the employee, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty, then

there should be some personal wrong on the part of the employee before he is held liable therefor. But it may be asked: Is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge, but the latter duty is discharged when reasonable care has been taken in providing safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution." (Pr. Rec. pp. 112-114).

The Bill of Exceptions shows (Pr. Rec. pp. 88-90) that the Court gave the instruction quoted in the above Assignment, and that the defendant excepted thereto, because not applicable to the issues made by the pleadings, and the evidence, in that the question of the failure of the master to provide a safe place to work, nor the question of the negligence of the master in selecting competent and fit persons to have charge of any particular work, were not raised either by the pleadings or the evidence.

The only allegations of negligence found in the Complaint are contained in the V paragraph (Pr. Rec.

p 9) and this negligence is charged to be the "negligence and carelessness of the officers, foreman, and vice-principal of said defendant corporation in causing said air and power to be cut off, etc." There is not a word about a failure of the defendant to furnish a safe place to work, or the failure of the defendant to employ fit and competent persons to have charge of the work. The evidence is all in the record and there is nowhere any evidence tending to show that the place where plaintiff was employed was unsafe, or that any employer of the defendant was incompetent, or unfit.

Under these circumstances, it was error to give the charge quoted and thereby leave it to the jury to find for the plaintiff if they saw fit, upon the ground that the place in which he was put to work was unsafe, or upon the ground that the machinery or appliances are unsafe, or upon the ground that the master had failed in his duty of employing competent and fit persons to have charge of the work. Yet all these questions are submitted to the jury. The jury might well infer from the charge complained of, that they were authorized by the Court to pass upon and determine whether or not Pope was a competent and fit person, and if they believed he was not, to find for the plaintiff. The attention of the jury should have been confined simply to the issues made by the pleadings and the evidence,

and not to do so was error. (Hunt vs. Kile, 98 Fed p. 53).

In conclusion, we respectfully submit that the judgment of the United States District Court for Alaska should be reversed, and a new trial granted.

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